RAMAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Spenser Wilkinson J.) May 10, 1949]

[K. L. — Criminal Appeal No. 1 of 1949]

Penal Code, ss. 499 and 500 — Defamation — Special exceptions under Evidence Enactment (Cap. 10), s. 105 — Finding of facts when cannot be supported.

The appellant in this case was charged with defamation under s. 500 of the Penal Code in that he stated to the complainant's manager that the complainant, C. Thurasingam, was selling rubber belonging to the estate. The appellant was convicted on the charge and sentenced to 3 months' simple imprisonment and from this conviction and sentence he appealed.

The learned President in his decision held that had the complainant been asked whether the words uttered were true or not he would have stated that they were untrue. The learned President further stated that the final paragraph of s. 499 of the Penal Code makes it clear that the Court could call on an accused to make his defence even it presumes that what the accused imputed was an imputation made in good faith. He went on to raise the question whether the Court could call upon an accused for his defence when it does not know which, if any, of the exceptions the accused might raise in his defence. He then decided that the *onus* is not on the prosecution to rebut all the possible exceptions and he therefore held that at the close of the case for the prosecution defamation had been proved.

Held: (1) in no circumstances is it permissible to base a finding of fact upon the supposed answer of a witness to a question which has in fact never been asked; (2) in criminal matters, whilst it is true that s. 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence. This being so, it was the duty of the learned President, at the close of the case for the prosecution, to consider not only whether a *prima facie* case of defamation under the first part of s. 499 had been made out but also whether facts had already, at that stage, been proved which brought the case within anyone of the exceptions.

Case referred to :—

(1) *Rex v. Christie* (1914) A.C. 545.

MAGISTRATE'S CRIMINAL APPEAL.

R. P. S. Rajasooria for the appellant.

Forbes (Solicitor-General) for the respondent.

Spenser Wilkinson J. : — The appellant was charged with defamation under section 500 of the Penal Code in that he stated to the complainant's manager that the complainant, C. Thurasingam, was selling rubber belonging to the estate. The appellant was convicted on the charge and sentenced to three months simple imprisonment and from this conviction and sentence he appealed.

In the second paragraph of his grounds of decision the President of the Sessions Court held that had the complainant been asked whether the words uttered were true or not he would have stated that they were untrue. Such a finding cannot be supported. If the learned President thought that such a question should have been asked he could have asked the question himself; but in no circumstances is it permissible to base a finding of fact upon the supposed answer of a witness to a question which he has in fact never been asked.

The learned Solicitor-General, whilst admitting that this finding could not be supported, contended that the finding was unnecessary because it is not for the prosecution to prove the untruth of the statement complained of; and that is for the defence to prove the truth of the words uttered if he relies upon the first exception to section 499 of the Penal Code which defines the offence. Whilst I agree with the contention put forward by the learned Solicitor-General I think it is at least unfortunate that the learned President based his decision partly upon this improper finding.

In his grounds of decision the learned President states that the final paragraph of section 499 makes it clear that a Court could call on an accused to make his defence even where it presumes that what the accused imputed was an imputation made in good faith. He goes on to raise the question whether the Court should call upon an accused for his defence when it does not know which, if any, of the exceptions the accused might raise in his defence. He then decides that the onus is not on the prosecution to rebut all the possible exceptions and he, therefore, holds that at the close of the case for the prosecution defamation has been proved.

I am of opinion that the learned President has based his decision on an incorrect view of the law regarding the onus of proof in cases of this kind. In criminal matters, whilst it is true that section 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence. This being so, it was, in my opinion, the duty of the learned President, at the close of the case for the prosecution, to consider not only whether a *prima facie* case of defamation under the first part of section 499 had been made out but also whether

facts had already, at that stage, been proved which brought the case within any one of the exceptions. Had he done this he would, in my opinion, have been bound to consider whether or not the eighth exception applied to the case. That exception reads as follows :—

> It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.
>
> *Illustration.*
>
> If A. in good faith accuses Z. before a Magistrate; if A. in good faith complains of the conduct of Z., a servant, to Z's master; if A. in good faith complains of the conduct of Z., a child, to Z's father — A. is within this exception."

It was quite clear from the prosecution evidence that the appellant had complained of the conduct of a servant of the manager to his master, the manager. Therefore, if the complaint was made in good faith then all the facts necessary to bring the appellant within the exception would have been made out. The final paragraph of section 499 reads as follows :—

> In proving the existence of circumstances as a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th or 10th exception, good faith shall be presumed unless the contrary appear.

The question, therefore, that had to be decided at the close of the case for the prosecution was whether or not the complaint had been made in good faith or whether the contrary appeared.

I can see nothing in the grounds of decision of the learned President to suggest that at the close of the case for the prosecution he really considered the question whether or not the evidence before him was sufficient to rebut the presumption of good faith and I am of opinion that he ought to have done this before calling upon the appellant for his defence. For this reason, I was of opinion that the conviction could not stand.

It was urged upon me, on behalf of the Public Prosecutor, that there was some evidence of lack of good faith in that the four labourers from whom the appellant told the complainant that he received the information subsequently denied to the manager having said anything of the kind. The evidence on this point given by the complainant and by the manager would certainly have been admissible had the four labourers concerned been called as witnesses; in that event the appellant would have had the opportunity of cross-examining them. As, however, the labourers were not called, I am inclined to think (although this point has not been argued before me) that the evidence as to their denial was inadmissible (*Rex v. Christie*[1]). There is no evidence on the record as to the behaviour of the appellant when these alleged denials were made so as to suggest that by silence or other means he accepted these statements as his own. Moreover, when the labourers were brought before the manager they were under no legal obligation to speak the truth and the reluctance of labourers in this country to do or say anything which might involve them in any kind of dispute is common knowledge. Where, as in this case, the alleged denial is deposed to by other witnesses and the appellant has no opportunity to cross-examine the labourers themselves as to this denial it would, in my view, be unfair to the appellant to look upon this as any evidence of lack of good faith. Indeed, the failure of the complainant to call these labourers suggests that their evidence, if given, would not have been favourable to the prosecution.

I did not feel, therefore, that this was a case in which it would be proper to order a re-trial and I, therefore, quashed the conviction and sentence.

Appeal allowed.

LIM KHOON AIK v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) May 17, 1949]

[Ipoh — Criminal Appeal No. 15 of 1949]

Penal Code ss. 408 and 477A — Joinder of charges of criminal breach of trust and falsification of accounts — Criminal Procedure Code (Cap. 6), s. 165.

The appellant in this case was tried before the District Court at Ipoh on a charge of criminal breach of trust under s. 408 and two charges of falsification of accounts under s. 477A of the Penal Code. These charges were tried together with a similar charge of criminal breach of trust against one E. A. Nunn. In the course of the proceedings the first charge against the appellant was amended by the insertion of the words "jointly with E. A. Nunn, the manager of the said Messrs. Whiteaway, Laidlaw & Co. Ltd." In the event he was convicted on the first charge as originally framed and on the other two charges. No application was made for a separate trial.

Held: where there is one charge of embezzlement and that embezzlement refers to two charges of falsification of accounts then those offences are so connected as to form part of the same transaction within the scope of s. 165 of the Criminal Procedure Code (Cap. 6).

Cases referred to :—

(1) *King-Emperor v. Attursing* A.I.R. 1932 Sind 65.

(2) *Emperor v. Manant K. Mehta* I.L.R. 49 Bom. 895.

MAGISTRATE'S CRIMINAL APPEAL.

T. E. Conaghan for the appellant.